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# THE FUTURE OF SCOTTISH LABOUR LAW: RECONCEPTUALISATION AND MODERNISATION

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## Introduction

The political landscape in Scotland and the rest of the United Kingdom has undoubtedly changed following the Independence referendum in September 2014 and with that comes the possibility for legal change. This was evident in the aftermath of the referendum with the Smith Commission and its subsequent recommendations.<sup>34</sup> Prior to the new Scotland Act 2016 being laid before the Westminster parliament,<sup>5</sup> the landmark election results in May 2015 saw the Scottish National Party (the SNP) elected to 56 out of the 59 Scottish seats at Westminster. This, again, changed the political landscape and has been viewed by the SNP and, by extension the Scottish Government, as a mandate to propose further devolution of powers to Holyrood with the overarching aim of achieving full fiscal autonomy.<sup>6</sup> One such proposal is the devolution of Employment and Equality laws, including laws relating to Trade Unions, Health and Safety at Work and the National Minimum Wage, to the Scottish Parliament.<sup>7</sup> This proposal has received support from the Scottish Trades Union Congress (STUC),<sup>8</sup> and Citizen's Advice Scotland has also advocated the further development of employment laws to address specifically Scottish issues, although they do not explicitly

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<sup>3</sup> The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (The Smith Commission, 2014).

<sup>4</sup> This is doubly the case in the light of the results of the UK referendum on membership of the EU held on 23<sup>rd</sup> June 2016, which resulted in an overall UK vote to leave the EU by a margin of 51.9% to 48.1%. In Scotland, however, 62% of voters opted to remain in the EU and 38% voted to leave, compared with England where the result was 53.4% for leave and 46.6% for remain. This result underlines the distinct nature of the political and cultural environments as between Scotland on the one hand, and England & Wales on the other.

<sup>5</sup> Scotland Act 2016 c.11

<sup>6</sup> Scottish Government, *Beyond Smith – Scottish Government proposals for more powers for the Scottish Parliament* (The Scottish Government, 2015), <http://www.gov.scot/Topics/constitution/publications/morepowersproposals> [Accessed 4 July 2016].

<sup>7</sup> Scottish Government, *Beyond Smith – Scottish Government proposals for more powers for the Scottish Parliament* (The Scottish Government, 2015), paras 6, 22-30 and 53-57. These proposals were also previously contained within various other SNP and Scottish Government documents: Scottish Government, *More Powers for the Scottish Parliament* (The Scottish Government, 2014), 25 and 31-32; SNP, *Stronger for Scotland* (SNP Manifesto, 2015), 11.

<sup>8</sup> STUC, *Submission to the Smith Commission*, (STUC, 2014), paras 3-4 and Appendix B.

recommend devolution in this area.<sup>9</sup> While there are no current commitments from the UK Government to devolve any of these specific competences to the Scottish Parliament, it is clear that there is support for the notion that bespoke Scottish solutions should be adopted for labour law issues.

Devolving such powers to the Scottish Parliament would not be an entirely novel concept for the UK, as employment rights are already devolved to the Northern Ireland Assembly.<sup>10</sup> This does not negatively impact on the UK labour market as a whole, and enables Northern Ireland to maintain the protection of employment rights currently either abandoned or reformed by the UK government.<sup>11</sup> Devolving similar powers to Scotland would equally enable the Scottish Parliament to take its own decisions regarding key labour law changes. It should be noted that there were specific political, geographical and economic factors within Northern Ireland that influenced their devolution settlement.<sup>12</sup> However, that should not prevent, as a matter of principle, similar powers from now being devolved to Scotland, particularly as the political and economic policy positions, as well as attitudes towards industrial relations and labour law,<sup>13</sup> are markedly different in Scotland from that of the rest of the UK.

This paper focuses on the main proposal of devolving labour law and related competences to the Scottish Parliament and examines the issue of how, given the opportunity to do so, labour law might be redesigned in a Scottish context. This analysis takes account of the distinct industrial relations partnership model that exists in Scotland, in particular between the Scottish Government and the STUC, encapsulated within their Memorandum of Understanding.<sup>14</sup> In this regard, we argue that there are two main strands of divergence and potential areas for change where distinctly Scottish approaches could effectively be adopted. The first relates to the framework for dispute resolution, some aspects of which could fall

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<sup>9</sup> Citizens Advice Scotland, *Fair Enough? Protecting Scotland's workers from unfair treatment*, (Citizens Advice Scotland, 2015).

<sup>10</sup> An overview of the transferred powers are available from Cabinet Office and Northern Ireland Office, *Guidance, Devolution Settlement: Northern Ireland*, (Cabinet Office and Northern Ireland Office, 2013), <https://www.gov.uk/devolution-settlement-northern-ireland> [Accessed 4 July 2016].

<sup>11</sup> As similarly argued by the STUC, *Submission to the Smith Commission*, (STUC, 2014), para 3, Appendix B, para 3.2.

<sup>12</sup> As noted in the STUC, *Submission to the Smith Commission*, (STUC, 2014), Appendix B, para 3.1.

<sup>13</sup> As we explore further below

<sup>14</sup> Scottish Government and STUC, 'Memorandum of Understanding between the Scottish Government and the STUC' (Scottish Government, 2015).

within the competence of the Scottish Parliament following the implementation of the Scotland Act 2016.<sup>15</sup> The second is redesigning the industrial relations framework to create a clearer social partnership model which more closely reflects the mainstream European model.

In analysing these potential areas for reform, comparisons will be drawn with other European countries, in particular the Republic of Ireland, a country very close to Scotland in terms of size, population, industry, trade and culture. Before doing so, an analysis of the development of labour law in the UK will be provided, with a look forward to how this could be re-conceptualised in a Scottish context. An overview will then be given of recent changes and issues in current UK labour law which could be addressed differently in a Scottish context, before examining the two key areas of proposed reform.

### **Re-conceptualising Scottish Labour Law**

If competence over labour law were to be devolved to Scotland, the Scottish Parliament would be able to consider ways in which the nature, scope and content of Scottish labour law might be redesigned and the administrative framework, including dispute settlement, within which it would operate. This would, firstly, require a reconsideration and re-conceptualisation of labour law. As Hepple previously noted, when referring to the demise of collective *laissez-faire*, '[a]n alternative labour law cannot be constructed out of nostalgia for those values. It has to be grounded in a close analysis of the present and an understanding of the past'.<sup>16</sup> Our analysis of the future of Scottish labour law must do the same. With that in mind, it is useful to consider the position of previous UK Governments and the rationale underpinning the Scottish Government's proposals for devolution, before offering a potential re-conceptualisation of Scottish labour law.

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<sup>15</sup> Scotland Act 2016 c.11, s.39. Consultation on a Draft Order in Council for the Transfer of Specified Functions of the Employment Tribunal to the First-tier Tribunal for Scotland was published by the UK government in January 2016. As presently drafted, the Order would transfer power to regulate Tribunal fees to the Scottish Parliament. However, concerns have been expressed over the loss of the distinctive Employment Tribunal in favour of the transfer of functions to the First-tier Tribunal, possibly entailing the loss of specialist Employment Judges.

<sup>16</sup> Bob Hepple, 'The Future of Labour Law' (1995) 24 I.L.J. 303 at 305

Labour law in the UK has undergone significant periods of regulation and deregulation.<sup>17</sup> A key part of this development of labour law has been a move from collective labour relations to individual employment rights, with trade unions having a much more marginal role.<sup>18</sup> In the UK as a whole, it is the history of labour law that the concepts of collectivism and individualism sit as uncomfortably as incompatible spouses within the wedlock of the employment relationship. From the collective *laissez-faire* of the 1960s-70s,<sup>19</sup> through the deregulation and growing political emphasis on individualism of the 1980s,<sup>20</sup> it can be seen that each of them attempts to dominate the other, and each of them seeks to maintain their independence from the other without ever embracing the idea that two spouses become one couple. The twin approaches of the UK state to industrial relations in the last 30 years has been to preserve the *laissez-faire* attitude of past eras in relation to collective bargaining whilst weakening the ability of trade unions to resort to industrial action as a weapon in the event of conflict.<sup>21</sup> Dickens notes that even under New Labour ‘there was a reluctance to privilege collective voice over more individualised methods of conducting employment relations’.<sup>22</sup>

However, individual rights have now also been eroded by the policies of the previous Conservative – Liberal Democrat Coalition government. Under the Coalition, UK Labour Law was pulled in two directions, primarily de-regulatory under the influence of the Conservative ideology on the one hand, and regulatory to a more limited extent under the Liberal Democrat influence on the other.<sup>23</sup> This reflects the aims underpinning their review

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<sup>17</sup> See Bob Hepple, ‘The Future of Labour Law’ (1995) 24 I.L.J. 303 and Bob Hepple, ‘Back to the Future: Employment Law under the Coalition Government’ (2013) 42 I.L.J. 203 for an overview of some of these shifts in UK labour law.

<sup>18</sup> P Smith and G Morton, ‘New Labour’s Reform of Britain’s Employment Law: The Devil is not only in the Detail but in the Values and Policy too’ (2001) 39 B.J.I.R. 119.

<sup>19</sup> Otto Kahn-Freund, *Labour and the Law* (1977).

<sup>20</sup> The twin policies of deregulation of industrial relations and strengthening of individualism have never been reversed, even during a Labour Government of 1997-2010 and were subsequently reinforced, firstly, by the Coalition Government 2010-2015 and again by the current Conservative administration elected in May 2015. For an overview of this see Linda Dickens, ‘The Coalition government’s reforms to employment tribunals and statutory employment rights – echoes of the past’ (2014) 45 I.R.J. 234 at 243.

<sup>21</sup> The focus of this paper is primarily on the issue of the collective bargaining framework rather than industrial action, therefore, there is no further discussion here of the latter issue.

<sup>22</sup> Linda Dickens, ‘The Coalition government’s reforms to employment tribunals and statutory employment rights – echoes of the past’ (2014) 45 I.R.J. 234 at 246.

<sup>23</sup> Bob Hepple, ‘Back to the Future: Employment Law under the Coalition Government’ (2013) 42 I.L.J. 203 at 205-207.

of Employment Law<sup>24</sup> which, Rodgers argues, mirrors both Conservative and Liberal Democrat ideals.<sup>25</sup> In particular, it is underpinned by economic efficiency and freedom on the one hand, and fairness on the other. These competing aims and perspectives illustrate the ongoing inherent tensions within the development of labour law. Others, like Dickens, argue that the current reforms reflect those of the previous Conservative government and in that respect it is a revival of those ideals and many of their policies.<sup>26</sup> The one key divergence from this ideology, and a reflection of Liberal Democrat policy, is the enactment of shared parental leave contained within the Shared Parental Leave Regulations 2014.<sup>27</sup> However, the light-touch and watered-down version of this right reflects the Conservative Party's influence in this context too.<sup>28</sup> This demonstrates the Coalition's focus on the 'minimum necessary'<sup>29</sup> as opposed to the adoption of minimum standards.

The resulting implications for labour law and those who rely upon it are, as Dickens notes, that '[w]orker protection as the objective of labour legislation, addressing the imbalance of power inherent in the employment relationship, has been displaced by regulation in the interest of a free market economy ...'<sup>30</sup> This is a significant consideration, particularly when viewed in the context of what Hepple describes as 'what the founders of Labour Law regarded as its 'special function'...' which is 'to 'be the guardian of human beings in an age of unrestrained materialism.'<sup>31</sup> This suggests that Labour Law has significantly moved away from its original objectives to instead better meet the needs and demands of employers. If Labour Law were to be devolved to Scotland, the Scottish Parliament could

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<sup>24</sup> As originally noted in BIS, *Flexible, effective, fair: promoting economic growth through a strong and efficient labour market* (BIS, 2011), 2 and reiterated in subsequent literature on employment law reforms.

<sup>25</sup> Lisa Rodgers, 'The UK Employment Law Review and Changes to Unfair Dismissal' (2012) 1 E-Journal of International and Comparative Labour Studies 145 at 145.

<sup>26</sup> Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234 at 34-235.

<sup>27</sup> Shared Parental Leave Regulations 2014, SI 2014/3050.

<sup>28</sup> Particularly in comparison with the original proposals. For commentary on the legislation see: Gemma Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (2015) 44 I.L.J. 123; Michelle Weldon-Johns, 'From modern workplaces to modern families – Re-envisioning the work-family conflict' (2015) 37(4) J.S.W.F.L. 395.

<sup>29</sup> BIS, *Flexible, effective, fair: promoting economic growth through a strong and efficient labour market* (BIS, 2011), 4.

<sup>30</sup> Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234, 238.

<sup>31</sup> Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42 ILJ 203, 203.

address this concern and return it to its original roots. Elements of this are evident from their arguments in favour of its devolution.

The Scottish Government's main justifications for having control of 'key economic levers' such as Employment Law are that it will enable them to 'create jobs and tackle inequality',<sup>32</sup> and 'boost competitiveness'.<sup>33</sup> While this is reminiscent of the arguments used by the Coalition government, and previous Conservative governments, to justify deregulation and the erosion of the role of trade unions, it is clear that the Scottish Government does not support the same approach towards Labour Law regulation. This is underscored by the Scottish Government's *Working Together Review* which examines the tripartite relationship between trade unions, employers' groups and the government working together towards more effective and successful workplaces.<sup>34</sup> Within the review it is clear that trade unions play a significant role, not only within workplaces, but also at a sectoral level, within wider society and, notably, that they are viewed as key stakeholders in the development of policy.<sup>35</sup> This evidences a significant role for unions in Scotland, which is not similarly reflected within the rest of the UK. While the review also acknowledges that employers' groups have to engage more fully in order to achieve more effective social partnerships,<sup>36</sup> it shows that the Scottish Government is committed to engaging all relevant stakeholders and working together to address, and find solutions for, labour market issues. This mirrors strongly the model of social partnership which operates at a European level,<sup>37</sup> which we discuss further below, and provides a distinct foundation for labour law within Scotland as compared with the rest of the UK, which does not formally recognise, or promote, social partnership agreements.<sup>38</sup>

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<sup>32</sup> Scottish Government, *More Powers for the Scottish Parliament* (The Scottish Government, 2014), iii.

<sup>33</sup> Scottish Government, *Beyond Smith – Scottish Government proposals for more powers for the Scottish Parliament* (The Scottish Government, 2015), para 5, see also 21-30.

<sup>34</sup> Scottish Government, *Working Together Review: Progressive Workplace Policies in Scotland*, (Scottish Government, 2014).

<sup>35</sup> Scottish Government, *Working Together Review: Progressive Workplace Policies in Scotland*, (Scottish Government, 2014), para 5.6-5.26

<sup>36</sup> Scottish Government, *Working Together Review: Progressive Workplace Policies in Scotland*, (Scottish Government, 2014), paras 5.25-5.26.

<sup>37</sup> This is acknowledged in Scottish Government, *Working Together Review: Progressive Workplace Policies in Scotland*, (Scottish Government, 2014), para 5.25.

<sup>38</sup> Scottish Government, *Working Together Review: Progressive Workplace Policies in Scotland*, (Scottish Government, 2014), para 5.4.

This analysis indicates that Scottish Labour Law would be based on the core principles of equality and social partnership. This suggests a stronger role for trade unions and/or other employee representatives, more dialogue and partnership between interested parties – recognising tripartism in all aspects of labour relations - and a greater focus on, and recognition of, the inequality of bargaining power between employers and employees.

Some support for mapping the way forward in Scotland can be taken from Hepple, who argued that the way forward for Labour Law may be a re-strengthening of labour relations, by enhancing the role of workplace representatives, and re-envisioning workplace structures.<sup>39</sup> This appears to reflect the existing relationships between trade unions, some employers, and the Scottish Government, and also the recommendations of the *Working Together Review*.<sup>40</sup> If Labour Law were devolved to Scotland, the Scottish Parliament and Government would have the opportunity to renegotiate the relationship between the social partners and to re-engage trade unions and employer's representatives in constructive dialogue, as opposed to maintaining a focus on adversarial relationships. In addition, they could re-envision workplace structures that would effectively meet the needs of both employers and employees, something which is, arguably, lacking at present.

### **Overview of current issues in UK Labour Law**

In order to clearly justify the recommendations for change, it is important to consider the main areas of deregulation enacted by the Coalition and present UK governments and the inherent problems with these. The key changes discussed here are: increasing the unfair dismissal qualifying service period; Employment Tribunal (ET) fees and reforms; and reducing the consultation period in collective redundancies. Each of these will be examined in turn.

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<sup>39</sup> Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42 ILJ 203, 203.

<sup>40</sup> Scottish Government, *Working Together Review: Progressive Workplace Policies in Scotland*, (Scottish Government, 2014), ch 8.



## ***Unfair dismissal***

The period of qualifying service required to access the legal protection against unfair dismissal has been increased from 1 to 2 years,<sup>41</sup> removing around 3 million employees from its protection.<sup>42</sup> This increases and returns the qualifying service period back to that enacted under the Thatcher government and which was unsuccessfully challenged in *R v Secretary of State for Employment ex p Seymour-Smith*.<sup>43</sup> Although it had been accepted by the majority in the House of Lords that, given the continued disparate impact, the provision indirectly discriminated against women,<sup>44</sup> it was nevertheless held by the same 3:2 majority that it was objectively justified because it sought to encourage recruitment by employers.<sup>45</sup> Nonetheless, following a change of UK Government in 1997, the qualifying period was reduced to one year prior to the case returning to the House of Lords.<sup>46</sup> The return to this extended qualifying service period raises further questions about whether it could again be challenged, particularly since it was accepted in *Seymour-Smith* that it could in principle amount to indirect sex discrimination.<sup>47</sup> Rodgers further notes that there is also the potential argument of disparate impact on young people and ethnic minorities,<sup>48</sup> and Dickens continues to include women in this consideration.<sup>49</sup> In addition, the fact that discriminatory effects were previously identified when the qualifying period was formerly 2 years raises questions as to whether the UK Government could continue to claim that the policy is

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<sup>41</sup> Employment Rights Act 1996, s 108 as amended by Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, SI 2012/989, art 3.

<sup>42</sup> As estimated by KD Ewing and J Hendy, 'Unfair Dismissal Law Changes – Unfair?' (2012) 41 I.L.J. 115, 116.

<sup>43</sup> *R v Secretary of State for Employment ex p Seymour-Smith (No.2)* [2000] 1 WLR 435 following a decision from the ECJ, now CJEU, in Case C-167/97 *R v Secretary of State for Employment ex p Seymour-Smith* [1999] E.C.R. I-623, challenging The Unfair Dismissal (Variation of Qualifying Period) Order 1985, SI 1985/782.

<sup>44</sup> *R v Secretary of State for Employment ex p Seymour-Smith (No.2)* [2000] 1 W.L.R. 435, 444-446 (Lord Goff) and 447-449 (Lord Nicholls).

<sup>45</sup> *R v Secretary of State for Employment ex p Seymour-Smith (No.2)* [2000] 1 W.L.R. 435, 450-452 (Lord Nicholls).

<sup>46</sup> The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999, SI 1999/1436.

<sup>47</sup> As discussed by Ewan McGaughey, 'Unfair dismissal reform: political ping-pong with equality?' (2012) Issue 226 Equal Opportunities Review, available from:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2014699](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014699) [Accessed 4 July 2016].

<sup>48</sup> Lisa Rodgers, 'The UK Employment Law Review and Changes to Unfair Dismissal' (2012) 1 E-Journal of International and Comparative Labour Studies 145, 148-149.

<sup>49</sup> Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234, 238.

objectively justified,<sup>50</sup> and that it can meet its claimed objectives, which were also previously questioned.<sup>51</sup>

It is further notable that the rationale behind the current policy reflects those previous objectives, which are similarly identified as to reduce burdens on employers and thereby encourage them to hire more staff.<sup>52</sup> Commentators have been unconvinced by these claims; instead, they argue that there is no evidence to support the Government's arguments.<sup>53</sup> This is further reinforced by the retention of the one year qualification period in Northern Ireland,<sup>54</sup> which suggests that the arguments advanced here have not been accepted in another part of the UK either. It is likely that the change in practice will do little more than undermine individual employment rights by further restricting employees' access to justice. Furthermore, the actual gains to employers in terms of potentially successful unfair dismissal claims is estimated by Ewing and Harding to amount to only 100 claims.<sup>55</sup> When viewed in the context of those who have lost their rights, this benefit is negligible. It certainly makes employment more precarious during the initial 2-year period and, as argued by Rodgers, could encourage a lack of investment in staff training and development and instead encourage higher staff turnover in order to avoid employment protection rights.<sup>56</sup> The potential consequence of this is reduced productivity and commitment from both employees and employers. This would surely be less cost-effective in the long run than increasing the burden on employees, particularly women, young persons and ethnic minorities.<sup>57</sup>

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<sup>50</sup> Which it does in BIS, *Resolving Workplace Disputes: Government response to the consultation* (BIS, 2011), para 117 despite acknowledging that it could have a disparate impact on certain groups, it is noted that this would not be considerable and in any event would be objectively justifiable.

<sup>51</sup> For instance, by the Court of Appeal in *R v Secretary of State for Employment ex p Seymour-Smith (No.1)* [1996] All ER (EC) 1, [1995] ICR 889, although the decision was overturned by *R v Secretary of State for Employment ex p Seymour-Smith (No.2)* [2000] 1 W.L.R. 435, 450-451 it highlights the limited impact of the policy on recruitment practices.

<sup>52</sup> BIS, *Employment Law Review: Annual Update 2012* (BIS, 2012), 5, 6.

<sup>53</sup> KD Ewing and J Hendy, 'Unfair Dismissal Law Changes – Unfair?' (2012) 41 I.L.J. 115, 116-119; Lisa Rodgers, 'The UK Employment Law Review and Changes to Unfair Dismissal' (2012) 1 E-Journal of International and Comparative Labour Studies 145, 147-149; Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234, 239-24.

<sup>54</sup> Employment Rights (Northern Ireland) Order 1996, SI 1996/1919, art 140

<sup>55</sup> KD Ewing and J Hendy, 'Unfair Dismissal Law Changes – Unfair?' (2012) 41 I.L.J. 115, 118

<sup>56</sup> Lisa Rodgers, 'The UK Employment Law Review and Changes to Unfair Dismissal' (2012) 1 E-Journal of International and Comparative Labour Studies 145, 147.

<sup>57</sup> Lisa Rodgers, 'The UK Employment Law Review and Changes to Unfair Dismissal' (2012) 1 E-Journal of International and Comparative Labour Studies 145, 148-149; Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234, 238.

## **ET reforms**

The introduction of ET fees further reinforces these concerns.<sup>58</sup> Tribunal Fees were introduced as part of the wider reforms to reduce the burdens on employers since it was perceived to be too easy to bring unmeritorious or spurious cases against employers.<sup>59</sup> In addition, reducing costs was also a key consideration.<sup>60</sup> Individuals either have to pay an initial issue fee of £160 for 'Type A' claims, or £250 for 'Type B' claims, and then an additional hearing fee of £230 or £950 respectively.<sup>61</sup> If the decision is appealed to the Employment Appeal Tribunal (EAT), then further issue fees of £400 are payable and a further £1200 when it proceeds to an oral hearing.<sup>62</sup> The reason for the difference between Types A and B is said to be the complexity of the legal issues raised, but the reality is that since 'Type B' claims include unfair dismissal, discrimination and equal pay it makes it more difficult for claimants who have been subjected to such treatment, and are more likely to be vulnerable, and, in some instances now unemployed, to raise actions against their (former) employers.<sup>63</sup> While the fees will be paid by the employer if the case is decided in favour of the employee, the presence and the level of fees may prevent certain individuals raising claims in the first instance. Not only does the introduction of fees potentially restrict access to justice,<sup>64</sup> but in

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<sup>58</sup> Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.

<sup>59</sup> BIS, *Resolving Workplace Disputes: a consultation* (BIS, 2011), 15-16 and 49-50; Ministry of Justice, *Charging fees in the Employment Tribunal and the Employment Appeal Tribunal* (Consultation Paper CP22/2011, Ministry of Justice 2011), 15. David Mangan, 'Employment Tribunal Reforms to Boost the Economy' (2013) 42 I.L.J. 409, 417-418, argues that the theme of employees as vexatious claimants underpins current employment law reforms.

<sup>60</sup> BIS, *Resolving Workplace Disputes: a consultation* (BIS, 2011), 15-16; BIS, *Resolving Workplace Disputes: Government response to the consultation* (BIS, 2011), 6.

<sup>61</sup> Categories and fees outlined in Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893, sch 2, tables 2-3.

<sup>62</sup> Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893, arts 13-14.

<sup>63</sup> For commentary on the implications of these reforms see: N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166; David Mangan, 'Employment Tribunal Reforms to Boost the Economy' (2013) 42 ILJ 409; Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234.

<sup>64</sup> Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42 I.L.J. 203, 206. KD Ewing and J Hendy, 'Unfair Dismissal Law Changes – Unfair?' (2012) 41 I.L.J. 115, 120-121 also raise some concerns about the introduction of fees.

doing so it arguably renders individualised employment rights as negligible because, if they cannot be enforced, what significance do they have?<sup>65</sup>

Despite the preponderance of critiques of the new fees regime, similar arguments were raised and rejected in an unsuccessful challenge to the introduction of fees brought by Unison.<sup>66</sup> In this application for judicial review,<sup>67</sup> Unison's arguments were two-fold. Firstly, it argued that the introduction of fees violated the EU principle of effectiveness because it had a negative impact on access to justice for certain groups, making it 'virtually impossible or at least exceptionally difficult for a significant number of potential applicants to afford to bring a claim.'<sup>68</sup> This reinforces many of the arguments raised above concerning access to justice. Secondly, they argued that this amounted to indirect discrimination against persons (particularly women) with various protected characteristics, and that this disadvantage has not been justified.<sup>69</sup> This, again, reflects concerns raised in the literature above regarding the disproportionate effect of the rules on the most vulnerable groups, particularly those who are/were in low paid jobs. Nevertheless, the English High Court rejected both arguments. What was notable about the decision was that, while it was accepted that ET claims had dramatically reduced following the introduction of fees,<sup>70</sup> this was deemed insufficient on its own to show that individuals were 'unable' as opposed to just 'unwilling' to raise claims.<sup>71</sup> Instead, the High Court indicated that evidence of specific identifiable individuals who had been denied access as a consequence of the introduction of fees had to be ascertained, in order to determine if the measure breached the EU principle of effectiveness.<sup>72</sup> Furthermore, the High Court rejected the discrimination claims on the basis that: focusing on a self-selected

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<sup>65</sup> A point also raised by David Mangan, 'Employment Tribunal Reforms to Boost the Economy' (2013) 42 I.L.J. 409, 418.

<sup>66</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] EWHC 4198 (Admin). For a discussion of the decision see Nicole Busby, 'Challenging Employment Tribunal Fees: *R (Unison) v Lord Chancellor and another (No 2)*' (2015) 19 Edin LR 254.

<sup>67</sup> There had been a previous application that had been rejected because there was insufficient evidence to assess the claims presented given that fees had only been introduced months earlier: *R. (on the application of Unison) v Lord Chancellor and another (No 1)* [2014] EWHC 218 (Admin).

<sup>68</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] E.W.H.C. 4198 (Admin) [2].

<sup>69</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] E.W.H.C. 4198 (Admin) [2].

<sup>70</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] E.W.H.C. 4198 (Admin) [55]-[60] and [96].

<sup>71</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] E.W.H.C. 4198 (Admin) [60].

<sup>72</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] E.W.H.C. 4198 (Admin) [61]-[62].

sub-group was inappropriate;<sup>73</sup> and the difference in fees between ‘Type A’ and ‘Type B’ claims was justified on the basis of their increased complexity.<sup>74</sup> In reaching this decision, the High Court accepted that the UK Government’s aims of transferring a part of the costs onto users, efficiency and encouraging ADR, underpinned the introduction of fees, and that it was not merely a cost-saving initiative.<sup>75</sup> In doing so, it reinforces the widening gap between employers’ and employees’ interests, a factor which clearly underpins these various employment law reforms.

Despite this decision, it is clear that the introduction of fees has had an impact on the choices that individuals make regarding whether to pursue claims in the ET.<sup>76</sup> A point that was not lost on the judges in the High Court.<sup>77</sup> As Busby argues, it is regrettable that the High Court could not infer from this evidence that the introduction of such fees is a barrier to access to justice for a number of working persons.<sup>78</sup> It is again notable that the Northern Ireland Assembly has not introduced similar fees for access to their Industrial Tribunals and the Fair Employment Tribunal. Furthermore, the Scottish Government has recently pledged to abolish ET fees in the current parliamentary session using newly devolved powers over tribunals.<sup>79</sup> This clearly reinforces the distinctly different priorities and approaches towards regulating labour relations between Scotland and England and Wales, which could diverge further if the power lay in Scotland.<sup>80</sup>

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<sup>73</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] EWHC 4198 (Admin) [70]-[75].

<sup>74</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] EWHC 4198 (Admin) [69].

<sup>75</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] EWHC 4198 (Admin) [83]-[90].

<sup>76</sup> The numbers of ET claims accepted has reduced from 191,541 in 2012/13, to 105,803 in 2013/14 and 61,306 in 2014/15. Figures taken from Ministry of Justice, *Employment and EAT tribunal statistics: financial year 2013-14* (Ministry of Justice 2014), Table E.1; Ministry of Justice, *Tribunals and Gender Recognition Certificate Statistics Quarterly: January to March 2015* (Ministry of Justice Statistics bulletin 2015), Employment tribunal receipts tables: annex C, Table C.2 <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2015> [Accessed 4 July 2016].

<sup>77</sup> *R. (on the application of Unison) v Lord Chancellor and another (No 2)* [2014] EWHC 4198 (Admin) [55]-[60] and [96].

<sup>78</sup> Nicole Busby, ‘Challenging Employment Tribunal Fees: *R (Unison) v Lord Chancellor and another (No 2)*’ (2015) 19 Edin. L.R. 254, 258.

<sup>79</sup> The Scottish Government, *A Stronger Scotland: The Government’s Programme for Scotland 2015-16* (2015) <http://www.gov.scot/Resource/0048/00484439.pdf> [Accessed 4 July 2016]. Rights conferred by the Scotland Act 2016 c.11, s.39.

<sup>80</sup> It is acknowledged that a Fees Remission scheme was introduced in Schedule 3 of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, however, criticisms have been made of the scheme from a number of sources, including Citizens’ Advice Bureaux. (Citizens’ Advice Bureaux, Four in five deterred by employment tribunal fees, Citizens’ Advice Bureaux, 2014), <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/four-in-five-deterred-by-employment-tribunal-fees/> [accessed 16 August 2016]. Notably, in their 30th September 2015 response to the Ministry of Justice for

The introduction of ET fees also raises wider questions about the role and function of ETs. It is asserted that ETs have now moved away from their industrial and tripartite roots,<sup>81</sup> which enabled individuals to have easier access to justice because they were quicker and more accessible than traditional courts, they were also less formal but decisions were made by experts including those from both sides of practice.<sup>82</sup> Instead, they are now much more like traditional civil courts.<sup>83</sup> This is evident in: moves towards increased formalism;<sup>84</sup> creating barriers to access to justice;<sup>85</sup> renaming Tribunal Chairmen as Employment Judges and extending their discretion to decide to sit alone in unfair dismissal claims;<sup>86</sup> as well as providing that appeals to the EAT may now normally be heard by judges sitting alone.<sup>87</sup> The permitting of judges to sit alone in unfair dismissal cases is all the more concerning given that, on the one hand, these cases are categorised as ‘Type B’ cases and, thus, more complicated, warranting higher fees. On the other hand, they are now capable of being decided by the Employment Judge sitting alone.<sup>88</sup> If such cases fall within the ‘Type B’ category does that not indicate that they are so sufficiently complex that the perspectives from both sides of industry

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England & Wales’ Review of Fees, the Chair of the Law Society of England & Wales’ Employment Committee drew attention to the UK Government’s projections in its Fees consultation held in 2012 which stated that 11-13% of claimants would receive full fee remission and 53% of claimants would receive part remission. This contrasted significantly with the Government’s own statistics published on 10th September 2015, which showed that in fact only 21% of all claimants received any remission at all. <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/letter-to-the-ministry-of-justice-employment-tribunal-fees-review-team/> [accessed 16th August 2016].

<sup>81</sup> S Corby and P Latreille, ‘Employment Tribunals and the Civil Courts: Isomorphism Exemplified’ (2012) 41 I.L.J. 387, 394-395; Linda Dickens, ‘The Coalition government’s reforms to employment tribunals and statutory employment rights – echoes of the past’ (2014) 45 I.R.J. 234, 236 and 244.

<sup>82</sup> See the Royal Donovan Commission: HMSO, *Report of the Royal Commission on Trade Unions and Employers’ Associations* (Cmd 3623, 1968) 156 and 157.

Linda Dickens, ‘The Coalition government’s reforms to employment tribunals and statutory employment rights – echoes of the past’ (2014) 45 I.R.J. 234, 245.

<sup>83</sup> And are increasingly being treated as such by the government as noted in Ministry of Justice, *Charging fees in the Employment Tribunal and the Employment Appeal Tribunal* (Consultation Paper CP22/2011, Ministry of Justice 2011), 11. For a discussion of the evolution of ETs see S Corby and P Latreille, ‘Employment Tribunals and the Civil Courts: Isomorphism Exemplified’ (2012) 41 I.L.J. 387.

<sup>84</sup> S Corby and P Latreille, ‘Employment Tribunals and the Civil Courts: Isomorphism Exemplified’ (2012) 41 I.L.J. 387, 396-398.

<sup>85</sup> N Busby and M McDermont, ‘Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings’ (2012) 41 I.L.J. 166; S Corby and P Latreille, ‘Employment Tribunals and the Civil Courts: Isomorphism Exemplified’ (2012) 41 I.L.J. 387, 399-401

<sup>86</sup> Now extended to include unfair dismissal actions: Employment Tribunals Act 1996, ss 4(2) and (3)(c) inserted by Employment Tribunals Act 1996 (Tribunal Composition) Order 2012/988, art 2.

<sup>87</sup> Employment Tribunals Act 1996, s 28 as amended by the Enterprise and Regulatory Reform Act 2013, s 12.

<sup>88</sup> For commentary see Bob Hepple, ‘Back to the Future: Employment Law under the Coalition Government’ (2013) 42 I.L.J. 203, 212-213.

and practice would provide valuable insights in the decision-making process? While the UK Government claimed to have acknowledged and accepted such concerns following the responses to the consultation, they were keen to press on with the reforms, in order to realise the cost-savings potentials that they could bring.<sup>89</sup> While the UK Government argues that the discretionary power remains with the Employment Judge to convene a full hearing if it is deemed necessary, these reforms have greatly reduced the number and types of hearings for which a full ET is convened, thereby discarding the concept of ‘the industrial jury’ and losing the expertise and first-hand experience of industrial relations provided by lay members; qualities which were seen as essential when Tribunals were first established in the 1970s.<sup>90</sup> This reinforces the underpinning rationale for such changes, which is purely cost-saving.<sup>91</sup> The underlying problem with this may be that, because the lines between ETs and civil courts are now so blurred, the founding rationale for ETs is entirely obscured and undermined.

Furthermore, the current focus on relatively unstructured ADR and early conciliation, which does not necessarily reach outcomes on the basis of the application of Labour Law,<sup>92</sup> nevertheless signals a fundamental erosion of Labour Law. Hepple wondered how long the tripartite panel will continue to be used in discrimination cases,<sup>93</sup> and it may not be long before ETs disappear entirely in favour of a more integrated civil court structure.<sup>94</sup>

These changes appear to reflect a wider trend within Labour Law away from valuing and reflecting the interests and perspectives of both employees and employers (and their representatives). A position which is arguably in contrast with the Scottish Government’s support for social partnership. Our proposals for revising the dispute resolution framework

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<sup>89</sup> BIS, *Resolving Workplace Disputes: Government response to the consultation* (BIS, 2011), 31-32.

<sup>90</sup> “Whilst I do not necessarily say that the inevitability of the result is the criterion that we should adopt, we have to remember that although the Employment Appeal Tribunal itself has of course industrial experience, it sits as an appellate tribunal from the Industrial Tribunal. The Industrial Tribunal is not merely a fact finding body, it is an industrial jury. That is not merely a phrase, but a concept that is to be taken seriously. It is only going to be in an extreme case, one that is very clear, that it is going to be possible for an appellate body properly to say that a jury would have inevitably reached the conclusion that the Employment Appeal Tribunal reached, when in the original case, albeit proceeding upon an incorrect basis, the Industrial Tribunal had come to a contrary conclusion”. Lord Justice Buxton in *Wilson v Post Office* [2000] E.W.C.A. Civ. 3036

<sup>91</sup> BIS, *Resolving Workplace Disputes: a consultation* (BIS, 2011), 43-45

<sup>92</sup> See some of the comments on the role of ACAS in resolving disputes in N Busby and M McDermont, ‘Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings’ (2012) 41 I.L.J. 166, 181-182.

<sup>93</sup> Bob Hepple, ‘Back to the Future: Employment Law under the Coalition Government’ (2013) 42 I.L.J. 203, 212.

<sup>94</sup> *Supra* no.15. The proposed transfer of ET functions to the First-tier Tribunal for Scotland arguably devalues this further.

reflect the need to return to the founding principles whilst also recognising the need to find an alternative mechanism for doing so. A return to the original functions of ETs, even in the guise of other dispute resolution mechanisms, may foster more productive workplaces and enable Labour Law to function more effectively.

### ***Collective redundancy consultation***

The final notable reform considered here is the reduction of the consultation period for collective redundancies involving over 100 employees within one workplace from 90 to 45 days.<sup>95</sup> The Coalition Government's aims behind this reform were to: improve the quality of consultations; better enable employers to respond to varying market conditions; and balance the interests of all employees, those made redundant as well as those remaining.<sup>96</sup> In particular, the Government wanted to ensure that there was: clear legislation; good relations between employer and employee representatives; and mechanisms enabling the Government to intervene where necessary.<sup>97</sup> While these are surely desirable objectives, and the new consultation period more closely reflects the EU Law position of 30 days,<sup>98</sup> it was enacted in a very different legal and industrial relations context. Trade unions are in a much weaker position in the UK than elsewhere in Europe;<sup>99</sup> they have more limited opportunities to undertake industrial action, which will be made much weaker following the enactment of the incumbent UK Government's recent reforms;<sup>100</sup> and collective bargaining is less pervasive. Trade unions are thus coming from a very different starting position and it is likely that they will not have been involved in any dialogue prior to redundancies being considered. If the Government genuinely wants to improve the quality of consultation, then more has to be done to reform the industrial relations framework and improve relationships between employers and employee representatives more generally in the first instance. Otherwise, the more limited period for collective consultation suggests that the right is again undervalued in

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<sup>95</sup> Trade Union and Labour Relations Act 1992, s 188(1A)(a) inserted by Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013, SI 2013/763, art 3(2).

<sup>96</sup> BIS, *Collective Redundancies: Consultation on changes to the rules* (BIS 2012), 5 and 15.

<sup>97</sup> BIS, *Collective Redundancies: Consultation on changes to the rules* (BIS 2012), 5 and 16.

<sup>98</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16, art 4

<sup>99</sup> As discussed further below

<sup>100</sup> Recent changes to the Trade Union and Labour Relations (Consolidation) Act 1992 c.52, as amended by the Trade Union Act 2016 c.15 but not yet in force, include: a 50% turnout threshold requirement for ballots to be valid (s.226(ia)); 40% of those entitled to vote must vote in favour of industrial action in cases involving 'important public services' (ss.226(2B)-(2E)); and reforms to picketing (ss.219-220A).



the UK context and could mean that solutions and/or alternatives to redundancy are unlikely to be found.

Despite these reforms aiming to improve employment conditions and reduce burdens on employers, in reality, employment is much more precarious, and the stability previously provided by Trade Unions is also lacking.<sup>101</sup> If Labour Law were devolved to Scotland, a new path could be set which would move away from the current trajectory of erosion of Labour Law. This would enable the Scottish Parliament to better meet the needs of Scottish workers and create Scottish solutions to address the current deconstruction of Labour Law and Labour Relations. With that in mind, lessons may be drawn from alternative European models which may help to influence and underpin a distinctly Scottish model.

### **European influences**

When re-envisioning Labour Law in Scotland, account should also be taken of the influence of EU Labour Law and its inherent focus on social partnership. The result of the recent UK Referendum on EU membership demonstrates that voters in Scotland clearly see their future as part of the EU<sup>102</sup> and, indeed, it brings into sharper focus the difference in the political and social perspectives of Scotland, on the one hand, and England & Wales, on the other. With the likely prospect of a second referendum on Scottish independence, it is timely to consider how an independent Scotland might develop its own approach to labour law and to appraise the internal and external influences which might mould and shape this approach.

Within the European Union, certain aspects of Labour Law fall within the scope of the social policy provisions of the Treaties.<sup>103</sup> Some of these aspects are highly developed at EU level e.g. working time, transfers of undertakings, redundancy consultations,<sup>104</sup> and others are not e.g. dismissals, strikes and trade union regulation.<sup>105</sup> Yet, there are three core

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<sup>101</sup> As noted by Bob Hepple, 'The Future of Labour Law' (1995) 24 I.L.J. 303, 306 and still equally relevant now.

<sup>102</sup> See fn.4, above.

<sup>103</sup> Article 153 TFEU.

<sup>104</sup> e.g. Directive 2003/88 concerning certain aspects of the organisation of working time [2003] OJ L299/9; Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16; Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16; Directive 2009/38/EC on the establishment of a European Works Councils or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast).

<sup>105</sup> Art.153(5) TFEU.

principles and themes of EU labour law which are commonly reflected in the labour law jurisdictions of most EU Member States: tripartism, solidarity and social partnership/social dialogue. The principle of solidarity is perhaps more concerned with the design of the substantive law, whereas tripartism and social partnership are reflected in both the system for dispute settlement and the substantive law. Elements of these themes have already been identified in our previous discussions of Scottish labour law, and they interconnect with the two main areas for reform identified previously, namely dispute resolution and collective labour relations.

Tripartism is a term which describes, loosely, the joint roles played by states, employers' organisations and employees' organisations in fostering and encouraging harmonious workplace relations.<sup>106</sup> The extent to which tripartism is utilised varies from state to state and is arguably undermined in the wider UK context, however, it is the hallmark of the International Labour Organisation's structure: 'This tripartite structure makes the ILO a unique forum in which the governments and the social partners of the economy of its Member States can freely and openly debate and elaborate labour standards and policies'.<sup>107</sup> A commitment to tripartism in Scotland is in keeping with these wider labour law standards and objectives.<sup>108</sup>

The principle of solidarity is stated in Art 2 TEU to be a value common to Member States and, in Art 3 TEU, it is an aim of the EU to promote solidarity between Member States, among peoples and between generations. Specific to the Labour Law context, solidarity is further provided for in Title IV (Arts 27-38) of the EU Charter of Fundamental Rights<sup>109</sup> where it includes *inter alia* employees' information and consultation rights, collective bargaining and strike action, fair and just working conditions, protection against unjustified dismissal, prohibition of child labour and protection of young people at work. Since the Charter now

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<sup>106</sup> The International Labour Organisation (ILO 1996-2015): <http://www.ilo.org/global/about-the-ilo/who-we-are/lang--en/index.htm> [Accessed 4 July 2016]. "The International Labour Organization (ILO) is the only tripartite UN agency with government, employer and worker representatives."

<sup>107</sup> ILO, *Tripartite constituency* (ILO 1996-2015) <http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.html> [Accessed 4 July 2016].

<sup>108</sup> As discussed earlier

<sup>109</sup> Charter of Fundamental Rights of the European Union [2010] OJ C83/389

has the same legal value as the EU Treaties,<sup>110</sup> these ‘rights, freedoms and principles’<sup>111</sup> are now accorded the status of fundamental rights within each member state’s legal system. It is submitted, therefore, that the solidarity principle is an important reference point in the context of this discussion and that these core areas of labour law should be fully and properly integrated into the design of an effective framework for labour law and dispute settlement.

The concept of social partnership and social dialogue was introduced first by the Single European Act (SEA),<sup>112</sup> which inserted a new Article 118B in the Treaty of Rome, entrusting the Commission with the task of developing dialogue between management and labour at EU level. This was developed further by the Treaty on European Union, signed at Maastricht in 1992.<sup>113</sup> Article 151 TFEU provides one of the EU’s social policy objectives as: ‘dialogue between management and labour’. The interplay between tripartism and social partnership is seen in Art 152 TFEU: ‘The Union recognises and promotes the role of the social partners at its level....It shall facilitate dialogue between the social partners, respecting their autonomy.’ This is taken a step further in Art 155(1) TFEU which provides that ‘[s]hould management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements’. Such agreements are given the force of law by Art 155(2). Art 153(3) extends the concept even further by providing that Member States may ‘entrust management and labour, at their joint request, with the implementation of directives’, devolving power to the social partners at national level to introduce measures by agreement to satisfy the state’s compliance with the directive’s provisions.<sup>114</sup> This also reflects some of the themes discussed previously and appears to correspond with the greater focus on social partnership and tripartism evident in Scotland as compared with the rest of the UK.

It is, therefore, submitted that these three principles ought to be central to any discussion of the design of a new system of labour law for Scotland. The opportunity exists for the Scottish Parliament to break with the UK’s propensity for labour law to become a

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<sup>110</sup> Article 6 TEU

<sup>111</sup> Article 6(1) TEU

<sup>112</sup> A Treaty which amended the founding Treaties (ECSC, EEC and Euratom). It was signed in February 1986 and came into force on 1<sup>st</sup> July 1987.

<sup>113</sup> Treaty on the European Union [1992] OJ C191/01. The current provisions are at Art 151-161 TFEU of the Treaty on the Functioning of the European Union (TFEU).

<sup>114</sup> This has only been used once in the UK, when an agreement was reached between the TUC and the CBI which became the blueprint for the Agency Workers’ Regulations 2010, SI 2010/93. Following the defeat of the Labour Government at the general election in 2010, the CBI sought to withdraw from or renegotiate this agreement.

political football, kicked back and forward with each change of government, and to design both a framework for labour dispute settlement and a substantive labour law which is fit for 21<sup>st</sup> century purpose: modern; compatible with EU and ILO principles; fair, just, efficient and effective. This paper considers a sample of labour dispute settlement procedures in other European jurisdictions beginning with the Republic of Ireland which, as mentioned previously, has similar demographics and experiences to those in Scotland. These examples will then inform proposed reforms of dispute settlement mechanisms in Scotland, following devolution of powers from the UK Parliament.

### ***Overview of dispute settlement in the Republic of Ireland***

In 2015, there were major changes taking place in the Republic of Ireland by way of reform of their administrative structures of employment law, as well as changes to aspects of compliance and enforcement. The relevant legislation is the Workplace Relations Act 2015, which was adopted in May 2015 and entered into force on 1<sup>st</sup> October 2015.<sup>115</sup>

The key aim of the legislation is to rationalise all the various different bodies that are active in the field of industrial relations law into a single point of contact for citizens, to be known as the Workplace Relations Commission.<sup>116</sup> Significant changes involve the abolition of Labour Commissioners<sup>117</sup> and the creation of a new post of Adjudication Officer, whose function is designed to be a mandatory intermediate step in the dispute settlement process before a party may commence full litigation in the Labour Court.<sup>118</sup> This is not the same as the ‘early conciliation’ scheme within the UK structure, as it requires attendance by both parties at a private hearing before the Adjudication Officer, who has power to determine issues in some types of claims (e.g. re-instatement, re-engagement) and, in others, to issue

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<sup>115</sup> Workplace Relations, ‘Reform of the State’s Workplace Relations Structures’ (Workplace Relations Act 2015, Number 16 of 2015)

[http://www.workplacerelations.ie/en/About\\_the\\_Reform\\_Programme/Reform\\_of\\_the\\_State\\_s\\_Workplace\\_Relations\\_Structures/Reform\\_of\\_the\\_State\\_s\\_Workplace\\_Relations\\_Structures.html](http://www.workplacerelations.ie/en/About_the_Reform_Programme/Reform_of_the_State_s_Workplace_Relations_Structures/Reform_of_the_State_s_Workplace_Relations_Structures.html) [Accessed 4 July 2016].

<sup>116</sup> Workplace Relations Act 2015, part 2. The Commission is headed by a Director General who determines the nature and destination of onward referrals of cases for resolution.

<sup>117</sup> Known also as ‘Rights Commissioners’, they had power to investigate disputes, grievances and claims referred by individuals under employment legislation. Depending on the statutory provision, they could issue binding or non-binding recommendations or decisions. There existed a right of appeal to the Labour Court or Employment Appeal Tribunal in appropriate cases.

<sup>118</sup> Workplace Relations Act 2015, part 4.

non-binding recommendations in regard to settlement of the parties' dispute.<sup>119</sup> Either party may seek a review of the Adjudication Officer's decision in the Labour Court.<sup>120</sup> Enforcement of the Adjudication Officer's decision, or a decision of the Labour Court, is via an enforcement order issued by the District Court. Further, as part of an anti-avoidance strategy in relation to compliance with Labour Court judgments, it is proposed to apply criminal law sanctions to an employer's failure to comply with a judgment to pay compensation to an employee.<sup>121</sup> This is done through the appointment of Inspectors, who have wide powers to require employers to provide information and, in some cases, have power to issue compliance notices and fixed penalties for certain labour law breaches. The Commission may also refer appropriate cases to a Mediation Officer. The effect of this reform is to bring together the enforcement regimes for minimum wage rules, illegal workers, working time, health and safety, under one umbrella with a statutory obligation on the new Commission to draft a 3-year strategic plan for the improvement in workplace relations, and an annual work plan, to be provided to the appropriate Minister of the Irish Government.<sup>122</sup>

This re-structuring of dispute resolution structures retains elements of informality which was characteristic of the ET system,<sup>123</sup> but also mechanisms for enforcing the decisions reached by the parties. In doing so, it appears to encourage parties to reach mutually acceptable conclusions to complaints as opposed to reinforcing adversarialism in the first instance.

### ***Other European examples***

A quick glance at the labour dispute settlement procedures operated by some other European states reveals a striking similarity in approach to that adopted in the Republic of Ireland. In France, the Conseil des Prud'hommes has a first 'conciliation stage', where one 'juge employeur' and one 'juge salarié' will attempt to conciliate the matter.<sup>124</sup> The parties' (or their representatives') attendance is compulsory. If there is a tie, the case will proceed to a

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<sup>119</sup> Workplace Relations Act 2015, s.41.

<sup>120</sup> Workplace Relations Act 2015, s.44. A further final appeal may lie to the High Court on a point of law.

<sup>121</sup> Workplace Relations Act 2015, s.51.

<sup>122</sup> Workplace Relations Act 2015, ss.21-23.

<sup>123</sup> For example, the post of Mediation Officer, to whom the Director-General may refer the dispute if s/he considers that it may be resolved at an early stage prior to being referred to an Adjudication Officer.

<sup>124</sup> Ministère de la Justice, France, 'Conseil de prud'hommes': <http://www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/conseil-de-prudhommes-12033.html> [Accessed 4 July 2016].

Hearing stage to be heard by an equal number of 'juge employeur' and 'juge salariés'. Decisions are taken by an absolute majority; where there is a tie, the case is sent back to the same group but with a 'juge d'instance' presiding this time.<sup>125</sup> The right to appeal is determined by the value and type of claim, however, where appeals are permitted these are heard within the formal court structure at the Court of Appeal.<sup>126</sup> This structure is replicated to a large extent in Switzerland, in the Tribunal des Prud'hommes.<sup>127</sup>

In Germany, there is a three-tier system consisting of first-instance Labour Courts, second-instance 'Land' Labour Courts, and the final-instance Federal Labour Court.<sup>128</sup> Labour law jurisdiction is undertaken by panels of several members. At Labour Courts and Land Labour Courts these panels are called Chambers and at the Federal Labour Court they are called Senates.<sup>129</sup> Chambers consist of one judge and two lay members, representing the employers' and employees' sides, respectively. Senates at the Federal Labour Court are made up of three judges and two lay members representing the employers' and employees' sides, respectively.<sup>130</sup> Labour Courts are first-instance courts where evidence is heard and judgment given. At appeal, the case is reheard by the second-instance 'Land' Labour Court, both on points of law and on the facts of the case. If required, witnesses may be heard or re-heard and documents reviewed. However, there are restrictions on introducing new evidence. Finally, the Federal Labour Court may hear appeals on points of law only against judgments given by Land Labour Courts.<sup>131</sup>

There are clear themes which emerge from this analysis and which relate specifically to the discussion in this paper: a focus on meaningful early conciliation in order to try to preserve the social partnership and the clear involvement of the tripartite principle to provide robust dispute settlement methods, supported by strong enforcement mechanisms.

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<sup>125</sup> *supra*

<sup>126</sup> Ministère de la Justice, France, 'Présentation de l'ordre judiciaire': <http://www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/> [Accessed 4 July 2016].

<sup>127</sup> République et Canton de Genève, 'Pouvoir Judiciaire, Justice et Tribunaux': <http://ge.ch/justice/tribunal-des-prudhommes> [Accessed 4 July 2016].

<sup>128</sup> Bundesarbeitsgericht – Federal Labour Court, General Information: <http://www.bundesarbeitsgericht.de/englisch/general.html> [Accessed 4 July 2016].

<sup>129</sup> *supra*

<sup>130</sup> *supra*

<sup>131</sup> *supra*

### ***Re-envisioning dispute settlement in Scotland***

It is clear from the literature and recent reforms that the current dispute settlement measures are not necessarily fit for purpose. For instance, the results of Busby and McDermont's pilot study of Citizens Advice Bureau clients who attempted to access ETs in order to resolve their disputes, tentatively support the concern that current mechanisms are barriers to justice for the most vulnerable employees.<sup>132</sup> It has also been widely recognised that ETs have become increasingly adversarial,<sup>133</sup> and a move towards alternative dispute settlement mechanisms such as those more prevalent across Europe may help to restore the underpinning aims and purposes of Labour Law.

In Scottish terms, an equivalent strategy to the Irish model would involve the merger of the functions of ACAS,<sup>134</sup> HSE,<sup>135</sup> HMRC<sup>136</sup> minimum wage compliance officers and UKVI<sup>137</sup> control of illegal working, under one administrative branch. This would have the advantage of being more efficient and cost-effective, although more significantly it would be a strategic way of ensuring compliance with all aspects of Labour Law. This could be achieved by a reconceptualization of the role and function of ACAS, which has been identified by a number of commentators as a possibility, although how they envision this role differs. One of the revised models mirrors the approach suggested here, which would see ACAS operating as the first point of entry in the dispute settlement process, in a way similar to the Irish Workplace Relations Commission. Busby and McDermont identify two key, although at times competing, justifications for this approach.<sup>138</sup> The first is based on the premise that 'informalism is a more appropriate mechanism for dispute resolution'.<sup>139</sup> This reinforces the original underpinning aims of the ET system and is arguably most appropriate in the employment context, where the underpinning aim should still surely be to encourage and enable the

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<sup>132</sup> N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166.

<sup>133</sup> S Corby and P Latreille, 'Employment Tribunals and the Civil Courts: Isomorphism Exemplified' (2012) 41 I.L.J. 387, 398.

<sup>134</sup> Advisory, Conciliation and Arbitration Service.

<sup>135</sup> Health and Safety Executive

<sup>136</sup> HM Revenue and Customs

<sup>137</sup> UK Home Office Visas and Immigration

<sup>138</sup> N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166, 178.

<sup>139</sup> N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166, 178.

employment relationship to continue following settlement of the dispute. The second reflects the need to address 'managerial demands for efficiency and value for money'.<sup>140</sup> While this should not come at the cost of maintaining and upholding labour law standards, a more cost-effective mechanism that enables both parties to reach an acceptable resolution to the dispute is undoubtedly worth pursuing. Busby and McDermont acknowledge that these justifications are often in tension, but it might represent a better balance between the interests of both parties than is currently possible.

Having re-structured the entry point for all labour law disputes, the deployment of 'Mediation Officers' and 'Adjudication Officers' along with a Labour Court broadly matching the present-day ET would mean that so many basic disputes could likely be resolved at the adjudication stage, freeing up the Labour Court (ET<sup>141</sup>) to deal with the more technical legal arguments presented by difficult cases. This would mean that cases are heard more quickly, are more fully argued and quicker and better quality decisions ensue. It could also mean the restoration of the 'industrial jury' principle and the tripartite principle – one employment judge sitting with one employers' and one employees', representative – to all employment cases and not only those with an Equality Act 2010 matter at issue. It would also mean that more disputes could be resolved in a more informal manner using 'Adjudication Officers'. As noted previously, this would not operate in the same way as the current 'early conciliation' process, which has been subject to some criticism. These critiques have focused on the underpinning rationale which is reducing costs and not improving workplaces, applying the legislation, or enhancing and/or resolving relations between employers and employees.<sup>142</sup> A part of the problem here is the perceived partiality of the conciliation officers,<sup>143</sup> as well as

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<sup>140</sup> N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166, 178.

<sup>141</sup> A suggestion would be to rename this body 'The Employment and Equality Tribunal', reflecting the two main statutory bases under which most claims are brought. In fact, the Tribunal's jurisdiction might arguably be extended to include those provisions of the Equality Act 2010 which are not presently justiciable in Tribunals e.g. education.

<sup>142</sup> Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234, 239 and 243. Similar issues regarding their roles have been noted by N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166, 181-183.

<sup>143</sup> As identified by N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166, 179-181.



the pressures to resolve cases before they could proceed to ETs whatever the costs.<sup>144</sup> Dickens argues that early conciliation could be much more meaningful and be used differently to not only help resolve disputes, but more importantly to improve the working environment so that such problems do not arise in the future.<sup>145</sup> The use of 'Adjudication Officers' with decision-making powers would help to achieve this.

With those reforms in place at grass-roots level, consideration would then have to be given to the question of whether it would continue to be necessary to preserve the EAT in Scotland but, instead, utilise the existing right of appeal into the Scottish courts structure, at the Court of Session Inner House level. This would be an attractive option because the structure is already in place, and appeals are already possible via this route.

In summary, the proposed approach to the design of a new Scottish Labour Law is in line with that taken by other mainstream European nations and is consistent with principles of EU Labour Law. In addition, it would address some of the concerns with the current ET structure and fees regime as well as the underpinning objectives of labour law by reinstating some of the key characteristics of ETs and the settlement of disputes originally envisaged therein.

### **Review of the industrial relations framework**

One of the distinctive features of the Scottish position, as compared with the rest of the UK, is the continuing significance of trade unions and social partnership in the context of industrial relations. Despite the erosion of trade unions otherwise in the UK, Hepple has previously noted the importance of collective responsibility, particularly in light of the 'decline in trade union strength and the fragmentation and shrinkage of collective bargaining'.<sup>146</sup> This appears to be all the more significant in the current context of deregulation of individual employment rights achieved by the previous Coalition, and current Conservative, governments.

The UK's approach to collective bargaining is demonstrated by s.179 of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides that:

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<sup>144</sup> N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 I.L.J. 166, 181-183.

<sup>145</sup> Linda Dickens, 'The Coalition government's reforms to employment tribunals and statutory employment rights – echoes of the past' (2014) 45 I.R.J. 234, 244-245.

<sup>146</sup> Bob Hepple, 'The Future of Labour Law' (1995) 24 I.L.J. 303, 306. This is reinforced by P Smith and G Morton, 'New Labour's Reform of Britain's Employment Law: The Devil is not only in the Detail but in the Values and Policy too' (2001) 39 B.J.I.R. 119, 134.

A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—

(a) is in writing, and

(b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

It is true that, for the most part, trade unions themselves have been lukewarm (at best) to the idea of extending legal enforceability to collective agreements. It is also true that, providing certain conditions are met, collective agreements may become legally enforceable by being incorporated into individual contracts of employment, either expressly<sup>147</sup> or impliedly. However, the conditions under which implied incorporation may be upheld by a Court or Tribunal are extremely exacting evidentially for trade unions, involving issues such as: whether the parties ‘intended’ that it should be part of the individual contracts or not;<sup>148</sup> whether the term is apt for incorporation;<sup>149</sup> whether the term of the collective agreement is a ‘term’ or ‘condition’ and therefore requires bilateral consent or entitles the employer to make unilateral changes;<sup>150</sup> whether custom and practice applies.<sup>151</sup> An informed bystander examining this from a neutral standpoint might be forgiven for thinking that the system is designed to make it as difficult as possible for collective agreements to become legally enforceable obligations, especially when one considers the unpredictability of success, the length of time, complexity, cost and legal fees (including ET fees) involved in instituting legal proceedings to enforce a collectively agreed term via an individual contract of employment. It is submitted, therefore, that the time is ripe for reform.

In the earlier discussion in this paper of reform of the labour dispute settlement framework, the principles of tripartism, solidarity and social partnership were considered. It is also important to consider these principles in the context of the law governing industrial relations, specifically, the law relating to collective bargaining.<sup>152</sup> The further reforms in the

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<sup>147</sup> For example, *Cadoux v Central Regional Council* 1986 S.L.T. 117

<sup>148</sup> *Shumba v Park Cakes Ltd* A2/2012/3358; [2013] EWCA Civ 974

<sup>149</sup> *Albion Automotive Ltd v Walker* [2002] E.W.C.A. Civ. 946, 2002 W.L. 1446211

<sup>150</sup> *Cadoux v Central Regional Council* 1986 S.L.T. 117

<sup>151</sup> *Henry v London General Transport Services Ltd* [2002] E.W.C.A. Civ. 488, [2002] I.C.R. 910

<sup>152</sup> As stated earlier, a review of the law relating to industrial action is outwith the scope of this paper. That is also a matter which requires to be addressed in the overall context of reform or re-design of Scottish labour law, however, it is submitted that the priority at this time is the discussion of potential collective bargaining

Republic of Ireland in this regard will first be considered, followed by a comparison with other EU partners and, finally, the implications for a devolved or independent Scotland will be discussed.

### ***Reforms in the Republic of Ireland***

In addition to the Workplace Relations Act 2015, the Irish Government has recently introduced the Industrial Relations (Amendment) Act 2015,<sup>153</sup> which amends the existing Industrial Relations Acts 1990 and 2001. The Act entered into force on 1<sup>st</sup> August 2015.<sup>154</sup> The recent Irish Government (2011- February 2016) which introduced both of these labour reforms was a coalition comprised of Ministers drawn from the Fine Gael party and the Labour Party. As part of the negotiations between the parties with a view to agreeing a programme for government, the Labour Party, as the smaller party, secured a commitment from Fine Gael to reform aspects of Ireland's industrial relations framework which had been shown to be fairly easily circumvented by the employers during the recent financial crisis.<sup>155</sup> Another driver for reform was the further decision of the Irish Supreme Court in May 2013 in *McGowan and others v the Labour Court, Ireland and the Attorney General*.<sup>156</sup> The Supreme Court in this case had declared the extension by a Government Minister of certain types of registered collective agreements to the whole sector to be unconstitutional, holding that, in terms of the Irish Constitution, only the Oireachtas (Irish legislature) is permitted to make laws and the extension of enforceability of a collective agreement to persons who were not parties to that agreement was a form of law-making which was outlawed by the constitution.<sup>157</sup> In the words of Gerald Nash, the Minister of State for Business and Employment, the main thrust of the new legislation is to:

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approaches and the emphasis on prevention of industrial action through a clearer, more certain, more balanced and fair-minded approach to the negotiation collective agreements.

<sup>153</sup> Industrial Relations (Amendment) Act 2015 (Number 27 of 2015).

<sup>154</sup> There were two Ministers responsible for steering the legislation through the Oireachtas (Irish legislature): the Minister for Jobs, Enterprise and Innovation (Fine Gael) and the Minister of State for Business and Employment (Labour Party).

<sup>155</sup> See *Ryanair v The Labour Court* [2007] I.E.S.C. 6 where the Irish Supreme Court held that where an employer was engaged and negotiating with a staff association, employees could not refer a dispute to the Labour Court until all internal procedures had been exhausted. This was viewed by Trade Unions as a serious limitation on their ability to engage in collective bargaining.

<sup>156</sup> *McGowan and others v the Labour Court, Ireland and the Attorney General* [2013] I.E.S.C. 21

<sup>157</sup> *supra*

‘bring a sense of certainty to both sides of industry who engage in such agreements around terms and conditions – particularly when the employer is tendering for contracts. Ultimately, I believe the legislation will improve industrial relations after a period of uncertainty. It will also help to prevent a race to the bottom in terms of skills, training and terms and conditions of employment.’<sup>158</sup>

There are two key provisions of the Act which will significantly alter the framework for conducting industrial relations negotiations in Ireland. Firstly, the Act deals with the situation where there are no collective bargaining arrangements in operation, by providing a mechanism whereby workers, with the assistance of a trade union, or indeed an organisation of employers, may apply to the Labour Court to examine the terms and conditions of employment, including remuneration, for a specified type or group, based on comparisons with similar employers.<sup>159</sup> A sectoral employment order may be reviewed by the Court, at the request of the Minister, after 3 years have elapsed.<sup>160</sup> The effect of the Order is that it has the power to alter the terms and conditions of contracts of employment across the sector to which it applies.<sup>161</sup> Secondly, where collective bargaining arrangements are already in operation, trade unions and employers will be able to apply to the Labour Court for registration of employment agreements which regulate terms and conditions within individual enterprises. These agreements, when registered, will be legally binding and adapt the contract terms and conditions of those within its scope.<sup>162</sup> This is a clear adoption by the Irish Government of the concept of extension of collective bargaining to ensure its effectiveness.

It is submitted that the Irish proposed reforms represent a clear endorsement of the principles of tripartism, solidarity and social partnership. The role of the state as facilitator is clearly set out, especially in terms of the judicial and executive functions, and the social partnership concept envisaged in Articles 152 and 155 TFEU and Article 28 of the EU Charter

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<sup>158</sup> Stephen Rogers, The Irish Examiner, ‘Collective bargaining legislation unveiled’, 9<sup>th</sup> May 2015: <http://www.irishexaminer.com/ireland/collective-bargaining-legislation-unveiled-329589.html> [Accessed 4 July 2016].

<sup>159</sup> Industrial Relations (Amendment) Act 2015 s.14. The Labour Court may make a recommendation to a Minister under s.16, and the Minister may then issue a ‘sectoral employment order’ in terms of s.17.

<sup>160</sup> Industrial Relations (Amendment) Act 2015 s.18

<sup>161</sup> Industrial Relations (Amendment) Act 2015 s.19

<sup>162</sup> Industrial Relations (Amendment) Act 2015 ss.8 and 11.

are also clearly defined. Moreover, it is submitted that the proposals are compliant with Article 4 of ILO Convention No.98 which provides that:

‘Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’<sup>163</sup>

Thus, the proposals also preserve the essence of voluntary collective bargaining which has always been a core principle of Irish industrial relations.<sup>164</sup> It is important to consider how the Irish proposals sit with the approach to collective bargaining taken by other member states of the EU.

### ***Other EU examples***

In France and Germany, collective bargaining operates at national level, industry or sectoral level and company level. In both countries, there is a long-established tradition of collective bargaining resulting in legally binding collective agreements; although the machinery for negotiation may be quite different the end results are the same, with agreements being legally enforceable.<sup>165</sup> For example, one study conducted in 2013 revealed that, in France, 98% of workers who were entitled to be covered by collective bargaining were covered by a collective agreement, and there was frequent use by the state of mechanisms for extension of applicability. In Germany, the figure was 58% but with a more limited use of extension. In

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<sup>163</sup> C098 Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively 1949

<sup>164</sup> McCann Fitzgerald, Briefing, ‘Important Industrial Relations Update – The Industrial Relations (Amendment) Act 2015’: <http://www.mccannfitzgerald.ie/McfgFiles/knowledge/6371-Important%20Industrial%20Relations%20Update%20-%20The%20Industrial%20Relations%20Amendment%20Act%202015.pdf> [Accessed 4 July 2016].

<sup>165</sup> Udo Rehfeldt, ‘The French System of Collective Bargaining’, 29 August 2010, Social Europe: <http://www.socialeurope.eu/2010/08/the-french-system-of-collective-bargaining/> [Accessed 4 July 2016] and Judge Annelie Marquardt, Richterin am Bundesarbeitsgericht, Bundesarbeitsgericht, Erfurt, paper presented at the XIVth Meeting of European Labour Court Judges 4 September 2006: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_dialogue/@dialogue/documents/meetingdocument/wcms\\_159943.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/meetingdocument/wcms_159943.pdf) [Accessed 4 July 2016].

the UK, fewer than 30% of workers entitled to be covered by collective bargaining were in fact covered by collective agreements and extension was rarely, if ever, used<sup>166</sup>. This study showed that there is a direct correlation between the use of extension mechanisms and collective agreement coverage: the greater the use of extension, the higher the coverage of collective agreements. The study also argues that high collective agreement coverage is a necessary part of ensuring a fairer distribution of wages and incomes and a more inclusive growth strategy for the economy.

One significant change that has occurred in both France and Germany over the last few years has been the ability of some company-level agreements to deviate from the industry-level agreement which was previously negotiated and governed industrial relations for the whole sector.<sup>167</sup> In France, the state is more proactive at national level rather than industry or company level, with the social partners being involved in the development of legislation in the area of industrial relations, employment and training.<sup>168</sup>

In Germany,<sup>169</sup> there are provisions very similar to the proposed reforms in Ireland. A Minister of the Federal Government of Germany is permitted, subject to certain conditions, to declare a collective agreement which began life as a regional or sectoral agreement to be universally applicable.<sup>170</sup> Further, under legislation, a Minister may extend a collective agreement to sectors where there is no collective agreement in force, in order to deal with individual employers' attempts to circumvent by resigning from employers' federations to set lower pay rates, thereby driving down labour standards.<sup>171</sup> A further strong feature of Germany's labour relations is the Works' Councils which, although outwith the formal collective bargaining regime in respect of remuneration, have certain rights of co-

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<sup>166</sup> T Schulten, L Eldring and R Naumann, *The role of extension for the strength and stability of collective bargaining in Europe*, ch.11 of *Wage bargaining under the new European Economic Governance* (ed. G an Guyes and T Schulten), published by the European Trade Union Institute (ETUI), 2015. This chapter was subsequently published in an updated and abbreviated form by ETUI as Policy Brief No 4/2016.

<sup>167</sup> *Supra*. Indeed, the recent industrial unrest in France in June 2016 stems from the French Government's attempts at labour law reform by allowing greater flexibility for companies to deviate from large-scale collective agreements and to have greater powers to disregard clauses in agreements regarding pay and working hours in favour of their own local approach.

<sup>168</sup> ETUI, 'Collective Bargaining' Newsletter (ETUI 2014) <http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Collective-Bargaining> [Accessed 4 July 2016].

<sup>169</sup> Derived from the guarantee of freedom of association provided in Article 9 GG [Grundgesetz]

<sup>170</sup> ETUI, worker-participation.eu, Germany, Collective Bargaining: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Collective-Bargaining> [Accessed 4 July 2016].

<sup>171</sup> *supra*

determination over matters such as disciplinary rules, breaks, overtime.<sup>172</sup> In France, there is also a system of Works' Councils, though their function is more to consult the workplace representatives rather than the German system of co-determination.<sup>173</sup>

Tripartism and social partnership is also evident in Switzerland, where the federal or cantonal government has the power to declare collective agreements universally applicable.<sup>174</sup> In Italy, the collective bargaining machinery is more haphazard but conforms to certain standards in regard to binding agreements once those have eventually been agreed or renewed e.g. minimum wage rates.<sup>175</sup> It is submitted that it is clear from this analysis that there is a consistent and coherent approach in mainstream Europe to the role and regulation of collective bargaining. The role of the state as facilitator of the social partners' dialogue is clear and effective, giving full effect to the social partnership and tripartite principles. The dichotomy between collectivism and individualism which has bedevilled UK Labour Law since the 1960s is, in the main, resolved whilst still preserving the essence of voluntary collective bargaining and maintaining a balance between both sides which is just and equitable.

### ***Implications for Scotland***

It is clear that the proposed reforms in the Republic of Ireland have set a course for an even closer alignment of that country's industrial relations framework with mainstream European states in terms of the role and machinery of collective bargaining. This is interesting because Irish labour law derives historically from a time prior to Ireland gaining independence from the UK in 1922 and, indeed, the similarities with UK law were to a large extent preserved until 1990 when Ireland began to embrace a more European-style approach to industrial relations, including tripartism and social partnership, and a greater degree of regulation and

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<sup>172</sup> *supra*

<sup>173</sup> ETUI, worker-participation.eu, France, Workplace Representation: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Workplace-Representation> [Accessed 4 July 2016] and *ibid*, Germany, Workplace Representation: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Workplace-Representation> [Accessed 4 July 2016].

<sup>174</sup> ETUI, worker-participation.eu, Switzerland, Collective Bargaining: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Switzerland/Collective-Bargaining> [Accessed 4 July 2016].

<sup>175</sup> ETUI, worker-participation.eu, Italy, Collective Bargaining: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Italy/Collective-Bargaining> [Accessed 4 July 2016].

involvement of the state in facilitating collective bargaining.<sup>176</sup> Until the financial crisis, arguably, the success of the changed industrial relations framework was a factor in the emergence of the Celtic Tiger.<sup>177</sup> Once the crisis occurred, the natural inclination of employers – as in other states – was to seek to detach from the obligations of collectivism. Hence, the proposed reforms in order to strengthen the role of industrial relations in Ireland once again.

What of Scotland? Should, and could, a Scottish Government bring about a similar change in approach to industrial relations through reform of the system of collective bargaining? It is submitted that, from the earlier analysis of the present system operating in the UK, apart from its overriding uncertainty and ambiguity, it can be seen from judicial decisions that that favours business and employers to a large extent, a situation which is augmented in times of economic depression and financial austerity. From a trade union/workers perspective, it may be argued that the present system has failed to maintain an appropriate balance between the competing interests of business and workers. This is also further borne out, in varying degrees, in much of the academic commentary discussed previously.

The erosion, deregulation and further retrenchment of UK labour law appears inevitable in the current political context. This is reinforced in the Trade Union Act 2016, which received Royal Assent on 4<sup>th</sup> May 2016 but has not yet entered into force. Arguably, this will further weaken the position of trade unions within the UK.<sup>178</sup> It has been argued here that, if labour law were to be devolved to the Scottish Parliament, it would provide the opportunity for a re-envisioning of labour law and industrial relations that would better reflect and address Scottish ideals, and could return to its founding principles.

### **The future of Scottish labour law: conclusions**

An integral component of any society is the world of work. Work is a human activity which engages every one of us at some point in our lives and work is an essential component in the

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<sup>176</sup> National Social Partnership Agreements from 1987-2009 governed by Industrial Relations Act 1990. See: ETUI, worker-participation.eu, Ireland, Collective Bargaining: <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Ireland/Collective-Bargaining> [Accessed 4 July 2016].

<sup>177</sup> J Geary, *Economic crisis, austerity and trade union responses: The Irish case in comparative perspective*, 2015 E.J.I.A., 1-17.

<sup>178</sup> As noted above at fn.100.



creation of a society's wealth and prosperity. Ensuring an appropriate balance between the rights and obligations under the law of those who hire labour and those who provide their labour is vital to the economic health and success of a society. Therefore, the legal regulation of the relationship between employers and employees/workers is something which is of concern to society as a whole. This of itself should provide sufficient justification for the involvement of the state in ensuring that there is machinery for collective bargaining and that it is fair and balanced, and that it is effective. It is also, it is submitted, a fuller implementation of the provisions of the ILO Convention, the EU Treaties, and the EU Charter of Fundamental Rights. It is also in the interests of both social partners: it is submitted that that much is evident from the comparison with collective bargaining systems in other EU states where productivity is generally higher.<sup>179</sup> If the Scottish Government succeeds in gaining devolved powers for the Scottish Parliament over employment law and industrial relations, then the opportunity will exist to align Scotland more closely with European mainstream theory and practice, embracing principles of tripartism, solidarity and social partnership, creating a bespoke system of industrial relations fit for purpose in the 21<sup>st</sup> century and in tune with the national culture, needs and aspirations of Scots as evidenced at the outset of this paper.

The two main areas identified for significant reform here, namely, the re-structuring of dispute settlement mechanisms and the revitalisation of the industrial relations framework, would re-focus labour law on the tripartite relationship, ensure solidarity through greater access to justice and resolution of employment disputes, and embed securely the concept of social partnership. The experience in Ireland shows the importance of addressing these two pillars of labour law regulation together, to ensure a coherent system of industrial relations that is fit for purpose. The wider experience throughout Europe also reinforces that a strong industrial relations framework can also enable the labour market to function more effectively. It is only within the independent (in the broadest sense of the word) Scottish context that the future of Scottish labour law can develop on this distinctly different path and, hopefully, restore labour law to its well-established and recognised founding principles.

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<sup>179</sup> ILO Governing Body, International Labour Office, Committee on Employment and Social Policy, *Collective Bargaining and the Decent Work Agenda*, Geneva, 2006 paras 23-26. Also, see OECD statistics for level of GDP per capita and productivity, 2014: [http://stats.oecd.org/Index.aspx?DataSetCode=PDB\\_LV](http://stats.oecd.org/Index.aspx?DataSetCode=PDB_LV) [Accessed 4 July 2016].